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The Eighteenth Amendment: what is...

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# The Eighteenth Amendment

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WHAT IS CONSTITUTIONALLY FEASIBLE TO HARMONIZE LIBERAL REGULATION WITH THE FUNDAMENTAL SPIRIT UNDERLYING THE AMENDMENT

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A NATIONAL TEMPERANCE COMMISSION, AT THE SAME TIME FACT-FINDING AND RULE-MAKING, SUPPLEMENTED BY CORRECTIONAL AND ADMINISTRATIVE TRIBUNALS—THE RULE OF REASON PRACTICALLY APPLIED

## THE EIGHTEENTH AMENDMENT

Since the Eighteenth Amendment seems for an indefinite time to come, to be firmly imbedded in the Constitution and is apparently almost as immutable as legend has it were the laws of the Medes and Persians; since repeal or even radical modification, even though that may be desired by the vast majority of the people of the United States, requires the assent of thirty-six out of the forty-eight states of the Union, since twelve states hold a veto power that in constitutional history is comparable only with the decrees of the Diet of the ancient Kingdom of Poland, where unanimity was essential to enact a new, or change an existing, law; since these and other formidable obstacles exist, wits have been racked in the effort to provide amelioration without doing violence to our fundamental law.

The result is that at the same time that an uphill struggle is taking place to secure either reconsideration or modification of the Amendment, much constructive effort is making in the direction of improving or repealing the Volstead Act and of modifying the regulations adopted as a result of that amendment; and attempts have been, and will from time to time be made to secure qualifications of apparently sweeping restrictive decisions under the law.

Fortunately those who seek to humanize the amendment or the law have, as a result of the recent election, been freed from the figurative application of the Customs of Locris of pleading for changes with ropes around their necks.

When and if, measures aimed at reforming the Volstead Act or the practice under it reach Congress, there is bound to be debate and discussion far more extensive and protracted than ever has been the case where proposed tariff schedules were involved. It must be obvious that the floor of Congress is not the place for sound deliberative constructive action with respect to a measure as to which a proper enumeration of those who oppose it, those who advocate temperance in principle and those who believe in some kind of modification of the law, has never been taken; and so long as Prohibition remains the football of politics, no countrywide enumeration is in the near future likely to be taken. Meantime each side claims to be in the majority, one decrying the evils of the policy whilst the other proclaims the benefits that flow from the enforcement of Prohibition.

Measures as complicated as those designed to carry out the intent



Yale Mar. 20, 1933



underlying the Eighteenth Amendment, can no more be scientifically discussed or calmly considered on the floor of Congress than at the polls, or for that matter in town-meeting. What Congress can well do is what it has done in relation to carriers, in the legislation dealing with the Interstate Commerce Commission; in regard to commerce, in the enactments governing the Federal Trade Commission; in the laws that control the Tariff Commission; in those that give power to the Federal Reserve System; and what the national legislature has done in many similar circumstances.

The plan that is here suggested is based upon a desire to secure calm consideration of the question and the promulgation of ordinances or regulations, that may from time to time be modified to suit the circumstances and be in accord with experience gained and to be gained in the administration of wholesome laws consistent with the Eighteenth Amendment so long as that remains a part of our fundamental law. The aim is to withdraw the question from the political arena and place it in an administrative forum.

Briefly stated, it is the creation of a powerful, non-partisan federal commission, broadly representative of opinion on all sides of the underlying problem, appointed by the President and consisting so far as possible of persons outside of the theatre of political controversy. Call the proposed body "National Temperance Commission", or if you will, "The Commission for the Enforcement of the Eighteenth Amendment",—names are immaterial—Empower it to regulate the entire liquor question. Repeal all legislation that would in anywise hamper such a commission in dealing with the problem *de novo*. Place such limitation upon its action as would safeguard those states that hold to a sweeping prohibition policy and strengthen that policy in such localities in ways that never could obtain congressional approval. Permit such commission after inquiry to define what are intoxicating beverages. Give to it power not only to regulate the manufacture, trade and even consumption of, but the right to create corporations for the purpose of dispensing, beverages.

In the plan here presented there are involved several law propositions with which I shall attempt briefly to deal. To summarize them at this point:—First, whether such a legislative policy would be constitutional in that seemingly upon such a commission there would be conferred power to make laws; second, whether by so doing the states that favor absolute prohibition within their own borders can through legal

measures be adequately protected against contraband traffic; third, whether it would be lawful for the federal government through such a commission to farm out the right to manufacture and/ or sell beverages.

The present law is merely one way of legislatively expressing the intent underlying the Eighteenth Amendment. The Amendment is not so sweeping as to preclude the Volsteadian dispensation in favor of household industry whereby fruit juices, such as cider and the fermented grape, even in concentrated form, satisfy many domestic beverage requirements; it is not so broad as to exclude sacramental wine or to bar a moderate amount of medicinal liquor; it does not prohibit transportation through the Canal Zone, nor withhold from foreign vessels immunity for carrying forbidden beverages in American waters; and it is so framed that from time to time minor relaxations have been tolerated, if not specifically approved, by those charged with the administration of the law made pursuant to it. In the circumstance if Congress has the right to replace the Volstead Act with something less drastic, the question next to be considered is whether it has authority to delegate to an administrative body, not the power to legislate but that of promulgating regulations not inconsistent with the Eighteenth Amendment.

## FIRST

Here we have long since ceased to be upon debatable ground. Commission after commission, one administrative board after another has been created by Congress; public officers have been clothed with power so closely akin to that of legislating, that for years the constitutionality of such enactments has been fought out in the courts, and successfully, in support of the legislation that conferred the power. A few instances will suffice.

In *Field vs. Clark,* 143 U. S. 649, the Supreme Court speaking through Mr. Justice Harlan, while saying (p. 692), "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution," * * * quoted (p. 693) with approval Judge Ramsey in *Cincinnati, Wilmington, etc. R. R. Co. v. Commissioner* 1 Ohio St. 88 thus: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made."



Chief Justice White in *Butterfield v. Stransham,* 192 U. S. 470, a case involving the importation of tea, said (p. 496): "Congress legislated upon the subject as far as was reasonably practicable and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by statute. To deny the power of Congress to delegate such a duty would in effect amount but to declaring that the plenary power vested in Congress to regulate foreign commerce, could not be efficaciously exercised."

And commenting upon the contention that the Secretary failed to take the evidence of importers he remarked (p. 497): "The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment to be honestly exercised."

In *Union Bridge Company v. U. S.* 204, U. S. 364, Harlan J. (reviewing the authorities), said (p. 387): "Indeed it is not too much to say that a denial to Congress of the right under the Constitution to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be to stop the wheels of government and bring about confusion if not paralysis in the conduct of public business."

And in *Monongahela Bridge Co. v. U. S.* 216 U. S. 177 by the same learned Justice * * * (p. 195): "Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject." * * * "Learned counsel for the defendant suggest some extreme cases showing how reckless and arbitrary might be the action of executive officers proceeding under an Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise."

In *U. S. v. Grimaud* 220 U. S. 506, where the question under consideration involved the power delegated to the Secretary of Agriculture under the Forest Reserve Acts which made the infraction of rules and regulations promulgated by him a criminal offense, Lamar J. said (p. 516): "In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent and not delegating to him legislative power."

He said further (p. 521): "It is true that there is no act of Con-

gress which in express terms, declares that it shall be unlawful to graze sheep in a forest reserve. But the statutes . . . declare that the privilege of using reserves for all proper and lawful purposes is subject to the proviso that the person so using them shall comply with the rules and regulations covering said forest reservation. The same act makes it an offense to violate these regulations."

The power of the Interstate Commerce Commission has grown through a series of laws and decisions thereunder,—so that to all intents and purposes its orders made pursuant to general enactments and adjudicated upon the principle that the express grant of power carries with it by implication all powers necessary to make effectual the specific authority conferred, have not merely the force of law but practically all the earmarks of legislation.

In *Texas Pacific v. Interstate Commerce Commission,* 162 U. S. 197, Shiras J., (with vigorous dissent from Brown and Harlan J. J., pp. 239-255, as regards the denial by the court of power in the Commission over foreign freight rates included in carriers' charges) said (p. 216): "Congress has not seen fit to grant legislative powers to the Commission," but later in *The Intermountain Rate Cases* 234 U. S. 475, 486, the Supreme Court held that the action of the Commission under the "long and short haul clause" was not an unconstitutional delegation of power.

In *Interstate Commerce v. Goodrich,* 224 U. S. 197, Mr. Justice Day said (p. 214): "The Congress may not delegate its purely legislative power to the commission but having laid down the general rules of action under which a commission shall proceed it may require of the commission the application of such rules to particular situations and the investigation of facts with a view to making orders in a particular matter within the rules laid down by the Congress."

The foregoing citations illustrate how the power of the Interstate Commerce Commission was built up by legislation which though at first limited by the courts was supported by strong dissenting minorities whose views eventually found lodgment in curative laws which today are beyond constitutional doubt, as was said by Mr. Justice Holmes in *Avent v. U. S.* 266 U. S. 127 (p. 130): "That in the circumstances Congress could require a preference in the order of purposes for which coal is carried, consistently with the Fifth Amendment is clear and is assumed in *Peoria and Pekin Union Ry. Co. v. U. S.* 263 U. S. 528, 532 (other cases cited). That it can do so without trenching on the powers



reserved to the States seems to us not to need argument. That it can give the powers here given to the commission, if that question is open here, no longer admits of dispute. *Interstate Commerce Commission v. Illinois Central R. R. Co.* 215 U. S. 452 (other cases cited) * * Congress can make violation of the Commission's rules a crime. *United States v. Grimaud,* 230 U. S. 506."

Similarly, powers given the Federal Trade Commission, though not as extensive as those hereinabove discussed, have been the subject of adjudication. (Chief Justice Taft in *Federal Trade Commission v. Klesner,* 274, U. S. 145, 151-2, and dissenting opinion of Justice Stone in *Federal Trade Commission v. Eastman Co.* 274 U. S. 619, 627).

Somewhat in point are the powers under the act creating the Federal Reserve System that were approved by the Supreme Court in *Attorney General ex rel First National Bank v. Fellows,* 244 U. S. 416, where it was held that (per syllabus)—"Legislative power was not unconstitutionally conferred on the Federal Reserve Board by the Act of December 23rd, 1913."

It is to be observed here that the expression is "legislative power". So apt is that expression, that it has found juristic lodgment in a number of opinions, of which citation of two very recent ones, will be sufficient.

In *Honolulu R. R. Co. v. Hawaii,* 211 U. S. 282, Moody J., said (p. 291): "It is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation."

In *Wichita Co. v. Public Utilities,* 260 U. S. 48, it was said (pp. 58-9): "The maxim that a legislature may not delegate legislative power has some qualifications as in * * * the regulatory policy of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised."

There is no need to multiply illustrations from other fields of administrative action where Congress with judicial approval has delegated what in effect is legislative power, however differently legal fiction may denominate it, as was said by Mr. Justice Stone in reference to an analogous power in *Federal Trade Commission v. Eastman supra,* "Nor does the fact that the Commission is not a court of equity lessen the power conferred by the Statute. It is, of course, essentially an administrative agency . . . But it is likewise true that it cannot be denied

powers granted by Congress merely because its orders resemble in form familiar equitable decrees."

## SECOND

With authority to provide regulations for the enforcement of the Eighteenth Amendment confided to an administrative commission it would be possible to empower such a body to vary or to adapt them to the especial or the relative needs of the different parts of the country. Such power of discrimination vested in the War Department was in the *Monongahela* and the *Union Bridge* cases cited *supra,* declared to be, constitutional. That the Interstate Commerce Commission possesses it, is shown when it promulgates rates and regulations varying according to its judgment of local conditions. The *Grimaud* case cited *supra* is an illustration of constitutional variances in forestry regulation, where violations, as we have seen, are made criminal offenses.

Accordingly, should it be found that the sentiment of a particular state or even of a part of a state was in favor of vigorous drastic enforcement of the Amendment, even to the extent of what might be lawful though obnoxious as regards the invasion of homes, or the making a crime out of what is now the lawful possession of liquor, or of absolutely banning it even for medicinal or sacramental purposes, the proposed Temperance Commission could constitutionally provide such measures as it found necessary to make more effective the sentiment predominant in different localities. To prevent the surreptitious introduction of even the mildest of beverages into such communities, it would be competent for it to delimit a surrounding zone wherein it would be unlawful to possess or to transport contraband beverages, for it has been held in *United States v. Lariviers* 93 U. S. 188, 194, "that Congress had power to extend the prohibition against the unlicensed introduction and sale of spirituous liquors in Indian Country to territory in proximity to that occupied by the Indians."

Similarly, should such a body after having studied the question find that in the interest of the public health more liberal regulations ought to be made, it could in those parts of the country where such provision would not be obnoxious, permit under adequate safeguards local distribution, for instance, through recognized medical societies, in accordance with rules of its own making.

The detailed questions that can arise are legion but in many instances are strictly sectional. Here is where authority would properly



be lodged in such a Temperance Commission because regarding a subject so controversial as this and with such kaleidoscopic shades of opinion, no wise decision not even sound compromises can be made either in legislative halls or in town-meeting. Clothed with authority to make criminal the violation of the regulations, as was approved in the *Grimaud* case *supra* and in *Avent v. United States* 266 U. S. 127, 130, such a commission would be rendered all-powerful in the enforcement of such regulations as it might promulgate.

## THIRD

Based as is this paper upon the theory that such a commission may find that there exists not merely a formidable, but an overwhelmingly large, body opposed to the present method of enforcing what it believes to be the spirit of the Eighteenth Amendment,—people who feel that while the saloon evil which the amendment was designed to overcome has been in large measure met, there have sprung up worse conditions, as the result of an unwise failure to discriminate on the part of the triumphant proponents of the Eighteenth Amendment between what was practicable or essential for the realization of its major purpose and what was so extreme as in time to arouse such widespread nullification. Should such a commission having so found devise a method whereby not only would the illegal traffic be extirpated but such liberalization in respect to the consumption of beverages be afforded, we should be saved from going to the opposite extreme, thereby losing whatever benefits have been derived from our "noble experiment". It may be difficult, but it should not be impossible, to restore proper personal liberty whilst retaining all that is most salutary in the Eighteenth Amendment; it should not be difficult so to safeguard that liberty that neither the saloon evil nor any other liquor abuse could be revived.

Here we have precedents drawn from England, from Scandinavia, from Canada and from our own country, from which such a Federal Temperance Commission could derive inspiration and upon which it could build. It would be possible to empower such a commission to approve or to enter into, contracts with one or more corporations for the manufacture, sale, import, export or distribution of beverages, for it is no new thing in federal administration to confide to departmental and quasi-departmental corporations power to carry on lines of business affected with a governmental interest. The World War brought into being a fair number of such corporations, but long prior thereto in order to

protect the Alaskan seal industry, the federal government having previously entered into a treaty with Great Britain upon that subject, made a lease with a semi-public corporation that came into existence to carry out,—of course with profit to itself,—the protective features of that convention.

This lease, executed in March 1890 pursuant to provisions of the United States Revised Statutes, of twenty years exclusive right to the Alaskan seal fisheries came before the court in *North American Commercial Company v. United States* 171 U. S. 110, where it was held that the power to regulate seal fisheries in the interest of the preservation of the species was a sovereign protective power. The grant of a monopoly to that end to a privately-owned but publicly-controlled corporation has never been questioned and so today that company is the source of all sealskins lawfully upon the American market. It has every selfish reason to see to it that the law with respect to the number and kind of seals that may be taken is rigidly adhered to. And so, if the beverage business were to be similarly administered those in possession of licenses from a federal administrative body would vigilantly co-operate in preventing violation of regulations either by those who are lawfully in business or by people who pursue the contraband trade of rum-running or boot-legging. In the days of local option in Massachusetts, the Boston liquor dealers from motives of self-interest were important aids in seeing that the law was enforced in temperance zones.

The Canadian precedent embraces the retail distribution. In the Province of Ontario in addition to limitation of the quantity that can be sold to a purchaser at any one time, there is a consumer's tax paid before obtaining a license to purchase. A commission dealing with the matter of beverages should, and constitutionally could, have the power to prescribe not merely the kind and cost of a license to purchase but where necessary, to promulgate discriminatory regulations with respect to the class of persons entitled to receive licenses. Such a provision would go a long ways towards curing some of the worst abuses of the unregulated traffic in liquor.

As in Bavaria the purity of the beer is most jealously supervised by the state; as in Canada the proof and the quality of the whiskey has always been the subject of the watchful control by the taxing authorities,—everything being bottled in bonds;—as both France and Germany are most solicitous with respect to viticulture and its fermented product; so here such a commission could, if it saw fit in the interest of pure food



and drink, exercise the most minute supervision over the manufacture of all types of beverage.

England has furnished the precedent of the gradual liquidation of saloons or rather their reduction to a minimum,—under which the number of "pubs" automatically closed out from year to year, makes the licenses of the survivors so increasingly valuable that the penalty of forfeiture is the strongest inducement to adhere closely to the law. Viscount Astor in a recent address over the radio said "England is more sober today than it used to be" and this no doubt is to be attributed to the measures of self-interest which those who survive in the business of purveying have felt themselves obliged to adopt. In other words "high pressure salesmanship" in the retail liquor trade has gone out there, much the same as it has disappeared with regard to securities here.

With experience derived from the administration of the liquor law both in Canada and in Great Britain such a commission would be in a position to make almost self-executing whatever conditions in contracts with manufacturers and distributors it might decide to impose.

To supplement the work of a Federal Temperance Commission it would be possible to create a special court or even an administrative board that would have power to try cases involving violation of the commission's decrees and regulations. This would restore the United States District Courts to their pre-Volsteadian function, by taking away that undignified police court business that has so hampered the general speedy administration of justice. Precedent for such a tribunal as an aid to an administrative commission is to be found in the Act of June 18th, 1910, creating the Commerce Court and amending the Act to Regulate Commerce,—a court that was abolished in December 1913 by the act vesting its jurisdiction in the District Courts.

The "noble experiment", upon which in a moment of exaltation we entered, found us unprepared to handle the matter in a statesmanlike manner. The constitutional provision that is so widely flouted has little more general respect than the usual New Years resolutions. Even the supposedly potent combination of price, prison and poison that the enforcement of the Volstead Act has brought into being has been powerless to overcome a fundamental human craving, on the contrary has introduced an element of adventure and ostentation in law-breaking. It is superfluous to elaborate upon the reign of terror that racketeers pandering to this appetite have brought about or to conditions in munici-

pal politics and in the police courts worse than in the most sodden saloon days.

Of course there is always the argumentative question how are you going to get Congress to abdicate its powers in favor of the unknown quantity of a presidential commission, how are you going to induce it to take a leap in the dark, if it is unwilling to make some of the modifications of the Volstead Act that those opposed to national total abstinence would expect of such a commission. Truly, this a a difficult question, yet the answer may be found in the experience that Congress has had with enforcement,—an embarrassing one to representatives who believe that their duty is to express the views of their constituents rather than their own but who have no accurate way of determining what their constituents really think upon a subject so susceptible of being split up into a multitude of questions. It is because of this and because of the further imponderable that the electorate has greater confidence even in the adverse rulings of a non-political commission than in what it so often suspects to be the time-serving action of those whose political lives are at stake, that hope may be expressed that a solution can be found through a commission that is not merely a fact-finding but a rule-making body.

BENJAMIN TUSKA.

New York, November 12th, 1930.

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